IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 840 OF 2004

Hindustan Petroleum Corporation)
Limited, having its registered)
office at J.Tata Road,)
Mumbai-400 020.).....PETITIONER

Versus

1. D.N. Vidhate, having his)
address at Block NO.4, Mansi)
Co-operative Housing Society)
Simpoli Road, Borivali (West))
Mumbai-400 092.)
2. Shri S.N. Saudhankar,)
Presiding Officer, Central)
Government Industrial Tribunal)
No.2, Mumbai)..RESPONDENTS

Mr. J.P. Cama, Senior Counsel with Mr.S.K. Talsania i/b.
Sanjay Udeshi & Co., for the Petitioner
Mr. K.K. Singhvi, Senior Counsel with Mr. S.S. Pakale and
J.P.Sawant, for Respondent No.1.

CORAM: F.I. REBELLO J.
DATE : 30th November, 2004

ORAL JUDGMENT:

1. Respondent No.1 was dismissed from the service of the petitioner after an enquiry. A reference came to be made pursuant to the directions issued by this Court. On reference the learned Industrial Tribunal by its Part I Award was pleased to hold that the enquiry held was not fair and proper and consequently permitted the parties to lead evidence before it in support of the charges of misconduct. On behalf of the petitioners several witnesses were examined. Respondent No.1 examined himself. The learned Tribunal by its Award dated 1st November, 2002 held that the charge of remaining unauthorisedly absent had been proved. In so far as charge of

late attendance on more than four occasions in a calender month is concerned it was also held to be proved. However, in so far as the charge of habitual or gross neglect of work or habitual or gross negligence recorded a finding in favour of Respondent No.1. In so far as the contention urged that the Respondent No.1 was penalised for union activities answered the same in the negative by holding that the workman was attending late and that he was habitual absentee and, therefore, it cannot be said that he was victimised for his union activities. The Tribunal thereafter considering Section 11A of the I.D.Act came to the conclusion that the punishment of dismissal is rather harsh and disproportionate to the charges and held that punishment of stoppage of one increment in future is proportionate and adequate.The Tribunal noted that in so far as the past record is concerned the probationary period of the respondent No.1 was extended and further that the Respondent was suspended on 14th April, 1993 and 21st January, 1997 and that he was also given memo and the past record of the workman was blemished. It is this order which is the subject matter of the present petition.

2. At the hearing of the petition on behalf of the petitioner their learned Counsel contends that the award of the Industrial Tribunal suffers from an error of law apparent on the face of the record. Firstly, it is pointed out that once the management based on the material on record, had imposed punishment of dismissal on the facts and circumstances, the Tribunal could not have interfered with the

order of punishment. It is specifically pointed out that the record would show that even in the course of the enquiry between August, 1998 to December, 2000 the respondent No.1 was unauthorisedly absent for about 238 days and this aspect which was considered by the Disciplinary Authority has not been considered by the Tribunal while considering the past record. On merits, it is contended that, the finding by the Tribunal that the management was unable to substantiate the neglect of work/gross negligence of work is totally perverse considering the evidence on record that the Respondent No.1 was holding meetings with contract workers at the work place during the working hours which evidence had gone undisputed. It is, therefore, submitted that this Court should interfere with the order of the Industrial Tribunal. Reliance has been placed on the judgment of a learned Single Judge of this Court in the case of The General Secretary, B.E.S.T. Workers' Union vs. The General Manager, The B.E.S.T. Undertaking & Ors., 1997 I CLR 898 to contend that the Court erred in not carefully looking to the past record of the employee and consequently ought not to have disturbed the order imposed by the Disciplinary Authority. Reliance is also placed in the judgment of another learned single Judge in the case of Brihan Mumbai Municipal Corporation v. The General Secretary, B.E.S.T. Workers Union & Ors., 1998 II CLR 1031. In that case the Driver was found guilty of habitual absence without leave. Lesser punishment imposed on him on five earlier occasions had failed to bring about any improvement and in those circumstances the order of the Labour Court and

Industrial Court holding that punishment of dismissal was shockingly disproportionate and directing reinstatement was patently erroneous. Reliance was also placed on the judgment in the case of Devendra Swamy v. Karnataka State Road Transport Corporation, 2002 1 CLR 323, that once the charge was found to be substantiated and considering the previous service record the punishment awarded by the Disciplinary Authority was fully justified.

. On the other hand on behalf of the Respondent No.1 the learned Counsel contends that once the Tribunal has exercised discretion under Section 11A of the Industrial Disputes Act this Court ought not to interfere in the exercise of its jurisdiction under Articles 226 and 227 of the Constitution of India. It is further contended that it is not open to this Court to reappreciate the evidence in the matter of a finding recorded that the petitioners have been unable to substantiate the charges of neglect of work/gross negligence of work. Reliance is placed on the judgment of the Apex Court in the case of Mukand Ltd. v. Mukand Staff & Officers Association, JT 2004 (3) SC 474 to contend that in the absence of a plea no amount of evidence led can be looked into.

3. The question, therefore, that would arise is whether it was open to the Industrial Tribunal on the facts and circumstances and the past record to interfere with the punishment imposed by the Disciplinary Authority. In terms of the memorandum the charges levelled against the workman may be

listed as under:-

28(i) habitual or gross neglect or work or habitual or gross negligence.

(xviii) late attendance on more than four occasions in a calendar month.

(xx) habitual absence without permission.

. There is no dispute and it has not been challenged in so far as the findings that charges under Standing Order 28(xviii) and 28(i) stood proved. The Industrial Tribunal in its Part II Award recorded a finding that the respondent No.1 himself admitted that his duties as boiler attendant was of essential nature. It further recorded a finding that he was unauthorisedly absent for 45 days and looking to the nature of the work he was to perform, certainly his absence was bound to create difficulties as disclosed by the management. The learned Tribunal thereafter proceeded to hold that the evidence supports the contention of the management that the respondent was attending late and leaving early and that the respondent was working in a high risk zone where admittedly in the year 1995 and 1997 accidents had taken place. On account of these findings the contention raised on behalf of the respondent NO.1 that he was victimised for union activities was rejected by recording the following finding:-

"On going through the record as a whole it is apparent that workman was attending late and that he was habitual absentee therefore cannot be said that he was victimised for his union activities."

Thus two out of three charges according to the Tribunal itself were held to be proved. The Tribunal, thereafter was pleased to note his past record. The Disciplinary Authority while imposing punishment of dismissal had considered the past record which was that he was suspended once in 1993 vide letter dated 14th April, 1993 pending charge sheet/enquiry for threatening two workmen of the FR Cafeteria and for forcibly taking them away from their place of work. He had been issued a caution letter on 23rd April, 1993. He was suspended for the second time in 1997 vide letter dated 21st January, 1997 pending charge sheet/enquiry for instigating canteen contract workmen of the FR canteen, LR canteen and cafeteria to strike work on 21st January, 1997 from 7.00 a.m. onwards and that he was issued a letter dated 17th February, 1997 revoking his suspension and advising him to refrain from such or similar instances in future. The Disciplinary Authority also considered the attendance from August, 1998 to December, 2000. It may be mentioned that the petitioner was charge sheeted for being absent for the period from January, 1998 to July, 1998. The Disciplinary Authority found from August, 1998 to December, 2002 the respondent No.1 was found to unauthorisedly absent on loss of pay for 238 days after exhausting leave to his credit during the period August, 1998 to December, 2000.

Before the Industrial Tribunal this past record was brought on record through witness A.G. Pathrose. In other words apart from the fact that the Respondent No.1 was found guilty by the Industrial Tribunal itself on two charges of misconduct and habitual absence, the record at the time of dismissal also would show that during the pendency of the proceedings he was absent unauthorisedly for 238 days. The past record of absence without leave for 238 days during the course of the enquiry was ignored by the Tribunal.

. The contention advanced on behalf of the Respondent No.1 is that this cannot be considered as this was not the subject matter of any enquiry. The expression used is the record of service which the Disciplinary Authority must consider. The record of service would not only include the issuance of Memos or the finding of guilty based on the charges levelled and/or admissions made, but will also include the entire service record including leave record which will have a bearing on the working of the Respondent No.1 in the establishment and his continuance. As noted earlier the charge sheet dated 12th August, 1998 will show that the Charge No.3 was habitual absence without permission. In the instant case not only was the charge found to be proved and established but the Respondent No.1 during the course of the proceedings before the Enquiry Officer was found to be unauthorisedly absent for a period of 238 days. It is in that context that the order of the Industrial Tribunal will have to be seen. This aspect of the matter of unauthorised absence

during the course of the enquiry which was considered by the Disciplinary Authority was given a go-bye by the learned Industrial Tribunal. In other words the Tribunal sought to exercise its powers under Section 11A in imposing the punishment, ignoring relevant material on record, of the workman during the proceedings being absent unauthorisedly for 238 days between August, 1998 and December, 2000.

4. The other aspect of the matter is that the Tribunal in so far as Charge No.1 namely habitual or gross negligence of work not to be proved. The reasoning is found only in paragraph 9 of the order of the Industrial Tribunal. The learned Tribunal proceeded on the footing that when the industry was in high risk zone and no outsider is allowed, it is difficult to believe that workman was holding meetings and neglecting his duties. It is true that this Court in the exercise of its extra ordinary jurisdiction would not ordinarily interfere with the findings of fact recorded by the Industrial Tribunal. In the instant case, however, we find that several witnesses examined on behalf of the petitioners had deposed to the fact that the respondent No.1 was holding meetings of contract workers at his work place. Several of the witnesses had so deposed. There was no cross examination on that count although to some witnesses suggestions were put denying that the workman was holding meeting of contract workers. What appears from the evidence is that the contract workers who otherwise were non-Departmental workers were meeting the Respondent No.1 at the work place in the course of

his duties. Considering that it could not be said that on the evidence available before the Industrial Tribunal that the management had failed even partially to prove the charge under Standing Order No.28(i).

5. Considering that we find that the Industrial Tribunal in holding that the punishment is disproportionate did not consider the entire past record of the respondent No.1. The judgment relied upon on behalf of the Respondent NO.1 in Mukund Ltd. (supra) to my mind would be of no assistance. In the instant case the Disciplinary Authority had considered the past record in the matter of unauthorised absence of 238 days after the charge sheet and continuation of the enquiry. Evidence on that aspect was also led before the Industrial Tribunal. It cannot be said that this was evidence which could not have been considered by the Industrial Tribunal. We have held that absence during the course of enquiry would be part of the past record. Once the enquiry was set aside it was open to the parties to lead evidence before the Industrial Tribunal. The management has produced the evidence in so far as the past record is concerned as also on charge (i).

. Once that be the case the question is whether the Industrial Tribunal ought to have interfered with the punishment imposed by the Disciplinary Authority on the ground that the punishment was disproportionate to the misconduct proved. In the instant case the Tribunal itself came to the finding that the respondent No.1 was entrusted with the duties

of essential nature and that the duties were in a high risk zone where admittedly in the year 1995 and 1997 accidents took place. Inspite of the fact that he was charge sheeted on the ground of habitual absence, during the proceedings itself the Respondent No.1 was unauthorisedly absent for 238 days between the period August, 1998 and December, 2000. Once this record was before the Tribunal and which record was proved by the management in my opinion the interference by the Tribunal in exercise of its powers under Section 11A cannot be sustained. The Tribunal ignored the material part of the record which was available and which had been considered by the Disciplinary Authority in imposing the punishment of dismissal.

. For the aforesaid reasons I am of the opinion that the Award of the Industrial Tribunal needs to be interfered with considering the charges of misconduct proved and the past record.

6. In the light of that the Award dated 1st November, 2002 is set aside. Rule made absolute in terms of prayer clause (a).

. Considering that there was an order in favour of the Respondent No.1 under Section 17B of the I.D. Act that order to be continued for a period of six weeks from today.

(F.I.REBELLO, J.)